California Labor & Employment Law Review

Volume 23
No. 5

September
2009

Official Publication of the State Bar of California Labor and Employment Law Section

FEHA 50th ANNIVERSARY 1959-2009

SPECIAL FEHA ANNIVERSARY ISSUE

MCLE Self-Study

Celebrating 50 Years of Fair Employment Laws in California: "The Real and Earnest Journey Into Equality and Freedom for All"[1]

By Nikki Hall

Nikki Hall is Senior Counsel in the San Francisco office of Renne Sloan Holtzman Sakai LLP. Ms. Hall has practiced employment law for the past 13 years, representing both employers and employees in FEHA-related actions. The author thanks Ivan Delventhal, an asscciate with Renne Sloan Holtzman Sakai LLP, for his research contributions on the early history of the FEPA as well as his creation of the MCLE Self-Assessment Test. She would also like to thank Kerry O'Donnell, Esq. for her editing contributions.

The 50th anniversary of California's fair employment law provides an ideal opportunity to reflect on the manner in which the law has evolved along with society's changing values. In its original incarnation, the Fair Employment Practices Act of 1959 (FEPA)[2] only prohibited an employer from discriminating against an employee based on race, religious creed, color, national origin and ancestry. Now, the Fair Employment and Housing Act (FEHA), the FEPA's successor,[3] has expanded those protections to also prohibit discrimination on the basis of sex (including pregnancy and gender identity), age, physical and mental disabilities, marital status, medical conditions (including genetic characteristics), and sexual orientation.

THE LONG ROAD TO PASSAGE OF THE FEPA

As early as 1945, there were efforts to enact fair employment legislation in

continued on page 14

— *Inside the Review* —

Elimination of Bias Specialty Credit MCLE, page 6

1 MCLE Self-Study: Celebrating 50 Years of Fair Employment Laws in California: "The Real and Earnest Journey Into Equality and Freedom for All" | 3 FEHA History-Makers | 4 No Mixed-Motive Instructions in ADEA Cases . . . At Least for Now | 5 FEHA by the Numbers: Preview of a Forthcoming Study | 6 Specialty Credit MCLE: Eliminating Bias in the Legal Workplace and Beyond | 7 Employment Law Case Notes | 8 Wage and Hour Update 9 Public Sector Case Notes | 10 NLRA Case Notes | 11 Cases Pending Before the California Supreme Court 47 Message From the Chair

California.[4] Communities were forced to address problems associated with discrimination and bigotry, as the state's population became increasingly diverse.[5] Despite these changing demographics, efforts to enact fair employment legislation floundered for years.[6]

That all changed when Governor Edmund G. Brown took office in January 1959, backed by a Democratic majority in the Legislature.[7] In his inaugural address before a joint session of the Legislature, the Governor urged legislators to pass fair employment legislation, stating that "discrimination in employment is a stain upon the image of California."[8] Governor Brown introduced a fair employment measure in the Legislature during his second week in office.[9] On April 16, 1959, he signed the FEPA into law, proclaiming it "a great moment in the history of California" and "a milestone in the long fight for equal opportunity and freedom from poverty."[10] During a ceremony marking the first anniversary of the law, Governor Brown noted that the FEPA, although a significant legislative accomplishment, marked only the beginning of "the real and earnest journey into equality and freedom for all."[11] The first Chairman of the Fair Employment Practices Commission echoed the Governor's sentiments when he stated that "prejudice persists, and much enforcement and educational work must be done before the ideal of equal opportunity for all is realized."[12]

THE JOURNEY FROM THE FEPA TO TODAY'S FEHA

In the 50 years following the FEPA's enactment, California's fair employment law has been repeatedly amended to broaden the scope of its protections, so that today, it provides more protections to employees than do the federal civil rights laws. The following are the most significant of these amendments.

1970 – 1978: Sex, Marital Status and Pregnancy Become Protected Traits

In 1970, a little over a decade after the FEPA's passage into law, it was amended to prohibit employment discrimination on the basis of sex.[13] In a letter urging Governor Reagan's support of the amendment, Assembly member Charles Warren wrote that the bill "will help to bring about a greater utilization of the talents and skills of all Californians."[14]

The FEPA was again amended in 1976, to prohibit discrimination against an employee on the basis of his or her marital status.[15] Analyzing the need for the change, the Legislature noted that "unmarried men often find it hard to secure promotions; unmarried women may find it hard to find jobs as they are deemed less stable; and married women are discriminated against as they are deemed temporary employees."[16] Therefore, the amendment was needed to "[e]nsure that no individual be discriminated against either because they are or are not married."[17]

Although sex was added as a legally protected trait in 1970, specific protections for pregnant employees were not added to the FEPA until the mid-1970's. Even then, only pregnant women who worked for, or sought employment from, school districts were protected from discrimination based upon pregnancy.[18] In 1978, however, the Legislature amended the law to protect employees from being discriminated against by *any* employer due to pregnancy, childbirth, or a related medical condition.[19] The amended law also required employers to offer up to six weeks of leave "on account of normal pregnancy," and allowed an employee to take up to four months of pregnancy disability leave.[20]

Currently, the FEHA requires an employer to allow an employee disabled by pregnancy, childbirth, or a related medical condition to take up to four months of pregnancy disability leave.[21] Moreover, an employer must provide reasonable accommodation to an employee for conditions caused by pregnancy, childbirth, or a related medical condition.[22]

1972 – 2002: Age as a Protected Trait

The FEPA was amended in 1972 to make it an unlawful employment practice to discriminate against an employee *between the ages of forty and sixty-four* on the basis of age.[23] However, the Legislature carved out an exception in circumstances where the employee "failed to meet bona fide requirements" for the job or position sought or held.[24] The Legislature also made clear that this new protection was not to be construed to affect bona fide retirement or pension plans, or to preclude physical and medical examinations of applicants and employees to determine fitness for the job.[25]

In 1977, the upper age limit of sixty-four was removed when the Legislature amended former Labor Code section 1420.1 to prohibit employment discrimination against those over the age of forty.[26] The amendment was enacted in response to the practice of employers requiring employees to retire at the age of fifty-five. According to the Legislature, the "[u]se of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement ... are obsolete and cruel practices."[27]

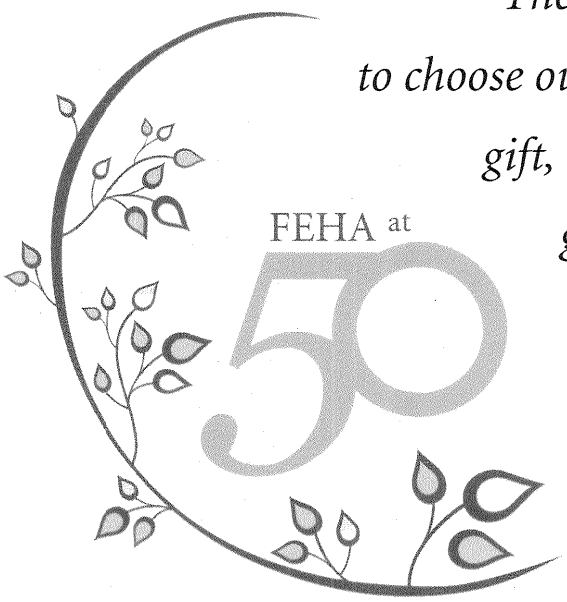
More recently, the FEHA was amended to address certain court decisions that undermined the prohibition on age discrimination.

1999: S.B. 26 – Rejection of Marks v. Loral Corp.

In 1999, S.B. 26 was enacted to explicitly reject *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997), in which the court of appeal held that, in determining which employees to lay off, an employer may "[p]refer workers with lower salaries to workers with higher ones, even if the preference falls disproportionately on older, generally higher paid workers."[28] With S.B. 26, the Legislature both overturned *Marks* and instructed courts to interpret the state's statutes prohibiting age discrimination "broadly and vigorously," with the "[g]oal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers."[29]

2002: A.B. 1599 – Rejection of Esberg v. Union Oil Co.

A few years after enacting S.B. 26, the Legislature rejected another court of appeal decision narrowly interpreting the FEHA's prohibition on age discrimination. In 2002, the Legislature passed A.B. 1599,[30] which overturned the decision of *Esberg v. Union Oil Co.*, 87 Cal. App. 4th 378 (2001). In *Esberg*, an employer refused to pay for a master's



"The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea, passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness."

~ President Barack Obama, Excerpt from Inaugural Address, January 20, 2009

degree for an employee who, in his mid-fifties, was "too old to invest in," according to the employee's supervisor. The court of appeal ruled in favor of the employer, holding that *Union Oil* was not required to extend educational and training benefits to employees over the age of forty. In response to *Esberg*, the Legislature amended the FEHA to clarify that it is also an unlawful employment practice to discriminate against an employee in the terms, conditions, or privileges of employment on the basis of age.[31]

1973 – 2000: Protections for Persons with Disabilities

The first disability-based protection came in a 1973 amendment to the FEPA that prohibited employment discrimination against those with a "physical handicap," which was narrowly defined as an "impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services."[32] Even though discriminating against someone with a physical handicap was prohibited, an employer had no duty to provide accommodation to an employee or applicant with a physical handicap.[33] Despite the obvious limitations of the initial protections for persons with disabilities, supporters of the legislation argued that it would "[c]ontribute to the handicapped and disabled attaining independence and self-support."[34]

It was not until nearly twenty years later, after the passage of the Americans with Disabilities Act of 1990 (ADA), that the FEHA was amended to prohibit employment discrimination against those with a mental disability.[35] At the same time, the FEHA was amended to conform to the ADA requirement that an employer make reasonable accommodation for an employee with a physical or mental disability, if it can do so without undue hardship.[36]

1975 & 1998: "Medical Condition" as a Protected Trait

In 1975, two years after the Legislature added "physical handicap" as a legally protected trait, it also prohibited an employer from discriminating on the basis of "medical condition." Initially, "medical condition" only included a "health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence."[37] This amendment was a response to the policy of many employers at the time of refusing to hire persons who had been treated for cancer, or requiring such persons to wait for a period of five years after their "cure" to be eligible for hire.[38]

More than two decades later, in 1998, the definition of "medical condition" was expanded to include genetic characteristics.[39] Given that some employers had terminated employees, or refused to hire qualified, currently healthy, individuals, based on a finding of a genetic predisposition toward illness, the Legislature believed this was a necessary expansion of the law.[40] The Legislature further reasoned that genetic tests, although capable of pinpointing a predisposition to a particular condition, are a "[p]oor predictor of disease – and even poorer predictors of disabling disease . . . ."[41]

It took the federal government 10 years to catch up with California when, in 2008, it enacted the Genetic Information Nondiscrimination Act.[42]

2000: A.B. 2222 – the FEHA Declared More Protective Than the ADA

A.B. 2222 was passed in 2000[43] and clarified that the FEHA's protection of persons with disabilities is broader than that provided by the ADA.[44] Most significantly, the Legislature explained that a person with a disability need only prove he or she is "limited" in a "major life activity." The ADA, on the other hand, requires a showing of a "substantial limitation" in a major life activity.[45]

In enacting A.B. 2222, the Legislature explicitly rejected a trilogy of U.S. Supreme Court decisions which held that one must look to the mental or physical impairment in its "mitigated" state to

determine whether an employee has a qualifying disability. Under California law and pursuant to A.B. 2222, whether a physical or mental impairment limits a major life activity is determined *without* reference to any mitigating measures (i.e., medications, prosthetics, assistive listening devices, etc.).[46] The Legislature also clarified that working is considered a "major life activity," regardless of "whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."[47]

In 2008, the United States Congress enacted the ADA Amendments Act, which makes it easier for an individual to prove he or she is disabled under the ADA.[48] Despite these amendments to the ADA, the FEHA remains broader and more protective of persons with disabilities.

1991 – 2008: Family Medical Leave

In 1991, two years before the landmark Family Medical Leave Act (FMLA) was enacted, California passed the California Family Rights Act (CFRA).[49] According to the Legislature, "surveys indicate[d] that about one-quarter of all workers must provide elder care support," and "the current trends towards home care ... add to the tension between work demands and family needs."[50] Further, acknowledging "the changing roles of men and women in the work force and the family" the Legislature stated that "both men and women should have the option of taking leave for child-rearing purposes."[51]

Under the CFRA as originally enacted, an employee with one year of continuous service to an employer[52] could take up to four months of unpaid leave in a twenty-four month period to care for a spouse, parent, or child with a serious health condition or for the birth of a child or placement of a child with the employee in connection with an adoption.[53] Prior to the 1993 amendments (discussed below), an employer could raise the defense of undue hardship to a request for leave under CFRA.[54] In addition, an employee who had already taken four months of pregnancy disability leave was only entitled to an additional one month of CFRA leave.[55]

1993: Amendments to the CFRA Following Enactment of the FMLA

The CFRA was amended in 1993 to reconcile it with the recently enacted FMLA.[56] In accordance with the FMLA, the CFRA now allows an employee to take leave for his or her own serious health condition, and the leave period has been changed to allow an employee to take up to twelve workweeks of leave in a twelve-month period.[57]

The following amendments were also made to ensure that the CFRA conformed with the FMLA: (1) eliminating the undue hardship defense; (2) requiring an employee to have worked at least 1,250 hours in the year preceding the leave to be eligible for leave; (3) requiring an employee to submit a medical certification supporting the need for leave for the employee's own serious health condition; (4) requiring the employer to maintain the employee's medical coverage; (5) stating that the employer can only limit CFRA leave if both parents of a child are employed by the same employer and the leave is in connection with the birth, adoption or foster care placement of a child; and (6) providing that a female employee is entitled to twelve weeks of CFRA leave for the birth of a child *in addition to* up to four months of pregnancy disability leave. More recently, state law has been amended to allow employees to take CFRA leave to care for registered domestic partners or the children of domestic partners.[58]

Just last year, the FMLA was expanded for the first time since its enactment in 1993, and there are now two additional bases for taking FMLA leave.[59]

1999 & 2003: Sexual Orientation and Gender Identity Become Protected Traits

In 1999, the protections of the FEHA were expanded once again, this time to make it unlawful for an employer to discriminate against an employee based on the employee's (actual or perceived) sexual orientation.[60] Although the Labor Code had prohibited employment discrimination based upon sexual orientation since 1992,[61] the Legislature concluded that it was necessary to include sexual orientation as a protected trait under the FEHA because different administrative procedures and remedies applied to claims brought by gay, lesbian, and bisexual individuals under the Labor Code, than those applied to claims brought under the FEHA by persons in other legally protected categories.[62]

Thereafter, in 2003, the definition of "sex" under the FEHA was amended to include a person's "gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[63] The purpose of this amendment was not only to "[o]ffer protection to transgender individuals," but to "[b]enefit any person who does not possess traits or conduct themselves in ways stereotypically associated with his or her sex."[64]

Federal law still does not prohibit employment discrimination based on sexual orientation or gender identity, despite recent efforts to change that.[65]

1982 – 2004: The FEHA's Anti-Harassment Provision

In 1982, the FEHA was amended to prohibit harassment of an applicant or employee for any of the traits protected under the law.[66] Initially, the anti-harassment provision only applied to employers of five or more persons; however, the statute was amended in 1984 to define an employer, for purposes of the anti-harassment provision only, to include those employing one or more person(s).[67]

1999: Protecting Independent Contractors from Harassment

In 1999, independent contractors were added to those protected from workplace harassment.[68] Such protection was needed, according to the Legislature, due to the "[e]ver-growing numbers of

workers who are hired as independent contractors rather than employees, and who currently work unprotected against harassment simply by virtue of the contractual nature of their work and their lesser cost to businesses who hire them."[69]

2003: Third Party Sexual Harassment

The FEHA was amended in 2003 to provide that an employer may be held liable for sexual harassment of employees and independent contractors by *non-employees* (i.e., customers, clients, and other third parties) if the employer knew or should have known of the harassment and failed to take appropriate corrective action.[70] However, the amendment made clear that in such cases the "extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees shall be considered."[71]

2004: Mandatory Supervisor Anti-Harassment Training

The most recent change with respect to the FEHA's anti-harassment provision was enacted in 2004. The Legislature mandated that, effective January 2006, and every two years thereafter, employers with fifty or more employees must provide at least two hours of training regarding sexual harassment to all supervisory employees and to all new supervisors within six months of their assumption of a supervisory position.[72] The Legislature noted that although employers could certainly provide longer, more frequent training regarding all types of workplace harassment or other forms of unlawful discrimination, supervisory training with respect to sexual harassment needed to be a mandatory requirement, given that sexual harassment "remains a major problem" in the state and continues to financially impact businesses.[73] Moreover, under the FEHA, employers are strictly liable for harassment committed by supervisors.[74] That aspect of the law provides strong support for the mandated proactive measures.

WHAT'S NEXT ON THE ROAD TO EQUAL EMPLOYMENT OPPORTUNITY?

Those of us who practice employment law are often too busy to consider California's fair employment law from a broad perspective or to reflect on how the law has evolved over the past half century. Indeed, our task is to remain focused on the present rights and obligations of our clients. However, when we take the time to consider the evolution of the law, we can see how far we have come as a state in the pursuit of equal employment opportunity for all.

Furthermore, given the history presented here, the law will continue to evolve based on changing societal values. We know this because the words of the first Chairman of the Fair Employment Practices Commission, noting that "prejudice persists" and that "much . . . work must be done before the ideal of equal opportunity for all is realized,"[73] remain true today.

ENDNOTES

1. Governor Edmund G. Brown's Address at the FEPA First Anniversary Observance (Sept. 21, 1960), *in* FEPC First Annual Report, at 15.
2. Cal. Lab. Code §§ 1410–1432.
3. Cal. Gov't Code §§ 12926 et seq., added by 1980 Cal. Stat. ch. 992.
4. Lawrence E. Davies, *Pacific States – Fair Employment Measures Face Strong Opposition*, N.Y. Times, Apr. 1, 1945, at E6.
5. Richard L. Neuberger, *The Changing Face of the West*, N.Y. Times Sunday Magazine, Sept. 12, 1948, at 42.
6. Lawrence E. Davies, *Drive on Job Bias Pushed on Coast*, N.Y. Times, Dec. 23, 1956, at 15 [noting that in every general session since 1945, efforts to enact fair employment legislation had failed].
7. *Gov. Brown Takes California Office*, N.Y. Times, Jan. 6, 1959, at 22.
8. *Id.*
9. *Id.*
10. Robert Blanchard, *Brown Signs FEPC Bill; Effective Sept. 18*, L.A. Times, Apr. 17, 1959, at 1.
11. Governor Edmund G. Brown, Address at the FEPA First Anniversary Observance (Sept. 21, 1960), *in* FEPC First Annual Report, June 30, 1961, at 15.
12. Letter from John Anson, FEPC Chairman, to Governor Edmund G. Brown (June 30, 1961), in FEPC First Annual Report, June 30, 1961, at 5 (emphasis added).
13. 1970 Cal. Stat. ch. 1508 (A.B. 22, 1969–1970 Reg. Sess.).
14. Letter from Charles Warren, Assemblyman, to Governor Ronald Reagan (addressing A.B. 22 (1969–1970 Reg. Sess.) (Aug. 24, 1970)), *in* Governor's Chaptered Bill Files, ch. 1508.
15. Assembly Office of Research Analysis (Third Reading) of S.B. 1642, 1975–1976 Reg. Sess., *as amended* Aug. 13, 1976.
16. Letter from Joint Commission on Legal Equality to Governor Edmund G. Brown (addressing S.B. 1642 (1975–1976 Reg. Sess.) (Sept. 14, 1976)), *in* Governor's Chaptered Bill Files, ch. 1195.
17. *Id.*
18. Former Cal. Lab. Code § 1420.2, added by 1975 Cal. Stat. ch. 914.
19. Former Cal. Lab. Code § 1420.35, added by 1978 Cal. Stat. ch. 1321. This law still allowed an employer to refuse to select a pregnant employee for a training program leading to promotion, provided she was unable to complete the training program at least three months prior to her anticipated pregnancy leave.
20. *Id.*
21. Cal. Gov't. Code § 12945(a).
22. Cal. Gov't. Code § 12945(b)(1).
23. Former Cal. Lab. Code § 1420.1, added by 1972 Cal. Stat. ch. 1144.
24. *Id.*
25. *Id.*
26. Former Cal. Lab. Code § 1420.1, *amended by* 1977 Stat. ch. 851.
27. *Id.* at § 1 (emphasis added).
28. *Marks v. Loral Corp.*, 57 Cal. App. 4th 30, 36 (1997).
29. Cal. Gov't. Code § 12941 (formerly § 12941.1), added by 1999 Cal. Stat. ch. 222 (S.B. 26), § 2 (*renumbered § 12941 and amended by* 2002 Cal. Stat. ch. 525 (A.B. 1599), § 3).
30. 2002 Cal. Stat. ch. 525, § 4 (A.B. 1599, 2001–2002 Reg. Sess.).
31. *Id.*
32. Since 1992, the FEHA has defined "physical disability" to include (1) having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the . . . bodily systems [and] limits an individual's ability to participate in major life activities; (2) any other health impairment not described [above] that requires special education or related services; (3) being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment; or (4) being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability. Cal. Gov't. Code § 12926(k).
In 1999, with the enactment of A.B. 1670, the Legislature clarified that the FEHA's protections against employment discrimination also cover discrimination based on an employee's *perceived* membership in a legally protected class (not just disability), as well as *association* with persons in a protected category (or perceived to be in a protected category).

Cal. Gov't. Code § 12926(m) (emphasis added).

33. Former Cal. Lab. Code § 1413(h), added by 1973 Cal. Stat. ch. 1189; Former Cal. Lab. Code § 1432.5.
34. Letter from W.C. Bradshaw, Chairman, California Governor's Committee for Employment of the Handicapped, to Governor Ronald Reagan (addressing A.B. 1126, 1973–1974 Reg. Sess.) (Sept. 26, 1973), *in* Governor's Chaptered Bill Files, ch. 1189.
35. Cal. Gov't. Code § 12926(i) ["mental disability" defined to include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."] It was not until 1999 that the Legislature eliminated a discrepancy in the treatment of physical and mental disabilities. Prior to 1999, only employers with fifteen or more employees were prohibited from discriminating against an employee with a mental disability; whereas, employers with more than five employees were prohibited from discriminating on the basis of an employee's physical disability. Added by 1999 Cal. Stat. ch. 591 (A.B. 1670, 1999–2000 Reg. Sess.).
    The Legislature came to realize that employees with mental disabilities had the same need for protection as those with physical disabilities. It found: "FEHA's current employer size requirement means that qualified individuals with psychiatric disabilities who work for smaller employers . . . effectively have no legal recourse against disability based termination, harassment or demotion. Further, qualified individuals with psychiatric disabilities have no access to basic accommodations such as time off for therapy, a leave of absence . . ., a quieter work space, or periodic breaks to take medications. Assembly Comm. on Judiciary Analysis of A.B. 1670 at 13-14 (May 11, 1999).
36. Subsequently, in 2000, California adopted the requirement that employers engage in an "interactive process" with employees to determine if reasonable accommodation can be made. Cal. Gov't. Code §§ 12926.1(e), 12940(n). The concept of an interactive process requirement was originally developed by the EEOC with respect to the ADA. *Id.*
37. Former Cal. Lab. Code § 1413(i), added by 1975 Cal. Stat. ch. 431.
38. Assembly Office of Research, Analysis of A.B. 1194 (1975–1976 Reg. Sess.), *as amended* June 19, 1975.
39. Cal. Gov't. Code § 12926(h), added by 1998 Cal. Stat. ch. 99 (S.B. 654, 1997–1998 Reg. Sess.).
40. Senate Judiciary Comm. Bill Analysis of S.B. 654 at 1 (Apr. 8, 1997).
41. *Id.*, at 4.
42. H.R. 493, 110th Cong. (2008) (enacted).
43. Cal. Gov't. Code § 12926.1, added by 2000 Cal. Stat. ch. 1049, §6 (A.B. 2222, 1999–2000 Reg. Sess.).
44. *See* Cal. Gov't. Code § 12926.1(a) [noting "the law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act . . . Although the federal act provides a floor of protection, this state's law has always, even prior to the passage of the federal act, afforded additional protections.] *See also* Senate Rules Comm. Analysis (Third Reading) of A.B. 2222 at 2 (August 28, 2000) (noting "[t]his bill is intended to assert the independence of FEHA as more protective of persons with disabilities than under the federal ADA").
45. Cal. Gov't. Code § 12926.1(c), (d) (explicitly rejecting the decision in *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993), in which the court asserted that the ADA's "substantial limitation" standard applied in cases brought under the FEHA).
46. Cal. Gov't. Code § 12926.1(c) (refusing to follow *Sutton v. United Airlines*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)).
47. Cal. Gov't. Code § 12926.1(c).
48. 42 U.S.C. §§ 12102, et seq.
49. Cal. Gov't. Code § 12945.2, added by 1991 Cal. Stat. ch. 462, §§ 2, 3 (A.B. 77, 1991–1992 Reg. Sess.).
50. *Id.*
51. *Id.*
52. Definition of "employer" included those employing 50 or more employees and excluded state and local governmental entities.
53. Cal. Gov't. Code § 12945.2, added by 1991 Cal. Stat. ch. 462 (A.B. 77, 1991–1992 Reg. Sess.).
54. *Id.*
55. *Id.*
56. Cal. Gov't. Code § 12945.2, *as amended by* 1993 Cal. Stat. ch. 827 (A.B. 1460, 1993–1994 Reg. Sess.).
57. *Id.*
58. Domestic Partners Rights and Responsibilities Act of 2003, added by 2003 Cal. Stat. ch. 421 (A.B. 205, 2003–2004 Reg. Sess.).
59. An eligible employee may now also take FMLA leave to care for a spouse, parent, child or next of kin who is currently serving in the military and is seriously injured in the line of duty ("military caregiver leave"), and "qualifying exigency" leave resulting from a spouse, parent or child of an employee being called to active duty or notified of an impending call to active duty. 29 U.S.C. § 2612; 29 C.F.R. § 825.112. Notably, an employee is entitled to take up to 26 weeks of military caregiver leave during a single 12 month period, as opposed to the typical 12 weeks of leave afforded employees for all other types of family medical leave. 29 C.F.R. § 825.200.
60. 1999 Cal. Stat. ch. 592, § 7.5 (A.B. 1001, 1999–2000 Reg. Sess.).
61. Cal. Lab. Code § 1102.1, added by 1992 Cal. Stat. ch. 951 (A.B. 2601, 1991–1992 Reg. Sess.).
62. Assembly Comm. on Appropriations Analysis of A.B. 1001 at 1-2 (May 26, 1999); *see also* Assembly Comm. on Labor and Employment Analysis of A.B. 1001 at 3-4 (Apr. 21, 1999).
63. Cal. Gov't. Code § 12926(p), added by 2003 Cal. Stat. ch. 164 (A.B. 196, 2003–2004 Reg. Sess.).
64. Senate Judiciary Comm. Analysis of A.B. 196 at 5 (June 17, 2003).
65. *See, e.g.,* Employment Non Discrimination Act introduced in Congress in 2007.
66. 1982 Cal. Stat. ch. 1193 (A.B. 1985, 1981–1982 Reg. Sess.).
67. Assembly Office of Research Analysis (Third Reading) of S.B. 2012, 1983–1984 Reg. Sess., *as amended* Aug. 21, 1984. (added by 1984 Cal. Stat. ch. 1754).
68. Cal. Gov't. Code § 12940(j), added by 1999 Cal. Stat. ch. 591, § 8 (A.B. 1670, 1999–2000 Reg. Sess.)
69. Assembly Comm. on Judiciary Analysis of A.B. 1670 at 9 (May 11, 1999).
70. Cal. Gov't. Code § 12940(j)(1), added by 2003 Cal. Stat. ch. 671, § 1 (A.B. 76, 2003–2004 Reg. Sess.) (noting rejection of *Salazar v. Diversified Paratransit, Inc.*, 103 Cal. App. 4th 131 (2002), which held that a paratransit driver subject to repeated sexual harassment by a passenger had no remedy under the FEHA).
71. *Id.*
72. Cal. Gov't. Code § 12950.1, added by 2004 Cal. Stat. ch. 933, §1 (A.B. 1825, 2003–2004 Reg. Sess.).
73. Assembly Comm. on Labor and Employment Analysis of A.B. 1825 at 2 (Mar. 31, 2004).
74. Cal. Gov't. Code § 12940(j)(1); *see also Department of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, 1041.
75. Letter from John Anson, FEPC Chairman, to Governor Edmund G. Brown (June 30, 1961), *in* FEPC First Annual Report, June 30, 1961, at 5.

MCLE Self-Assessment Test

MCLE CREDIT

Earn one hour of general MCLE credit by reading **"Celebrating 50 Years of Fair Employment Laws in California: 'The Real and Earnest Journey Into Equality and Freedom for All' "** and answering the questions that follow, choosing the one best answer to each question.

Mail your answers and a $25 processing fee ($20 for Labor and Employment Law Section members) to:

Labor and Employment Law Section • State Bar of California
180 Howard Street • San Francisco, CA 94105

Make checks payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks. *Please include your bar number and e-mail.*

CERTIFICATION

The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing education. This activity has been approved for minimum education credit in the amount of one hour.

Name _____ **Bar Number** _____ **E-mail** _____

1) The FEHA provides fewer protections to employees than do federal civil rights laws.
❑ True ❑ False

2) In amending the FEPA in 1976 to prohibit discrimination against employees on the basis of marital status, the Legislature focused only on prejudice against unmarried and married women.
❑ True ❑ False

3) The Legislature amended the FEPA in 1978 to protect employees from being discriminated against by any employer due to pregnancy, childbirth, or related medical condition.
❑ True ❑ False

4) In its present form, the FEHA provides that an employer must allow an employee disabled by pregnancy, childbirth or a related medical condition to take up to four months of pregnancy disability leave.
❑ True ❑ False

5) An employer is exempt from the obligation to provide accommodation for an employee for conditions caused by pregnancy, childbirth or related medical conditions if the employee occupies an "essential and indispensible" supervisory or management position.
❑ True ❑ False

6) In *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997), the court of appeal held that it was permissible for an employer, in deciding which employees should be laid off, to prefer lower-paid employees to higher-paid employees, even if this had a disproportionate impact on older, generally higher paid workers.
❑ True ❑ False

7) The Legislature overturned *Marks v. Loral Corp.* in 1999 with the passage of S.B. 26, which directed courts to interpret state age discrimination law "broadly and vigorously," so as to protect older workers both as individuals and as members of a group.
❑ True ❑ False

8) *Esberg v. Union Oil Co.*, 87 Cal. App. 4th 378 (2001) is valid precedent for the argument that an employer may lawfully refuse to extend higher education and training benefits to employees older than 40.
❑ True ❑ False

9) Since its inception, the FEHA has provided protections against discrimination on the basis of disability.
❑ True ❑ False

10) In 1990, the FEHA was amended to require that an employer provide reasonable accommodation for an employee with a physical or mental disability, if doing so would not pose an undue hardship.
❑ True ❑ False

11) It was not until 2008 that the definition of "medical condition" in the FEHA was amended to prevent discrimination on the basis of genetic characteristics.
❑ True ❑ False

12) Under California law, a person must be substantially limited in a "major life activity" in order to have a qualifying disability.
❑ True ❑ False

13) The FEHA requires that in determining whether a mental or physical impairment amounts to a qualifying disability, one must look at the impairment with reference to mitigating measures such as medications, prosthetics, and assistive listening devices.
❑ True ❑ False

14) Under the FEHA, working is considered a "major life activity" only if a person's limitation on working implicates a broad range of employment categories.
❑ True ❑ False

15) The California Family Rights Act, included within the FEHA, allows an employer to raise the defense of undue hardship to a request for leave under the Act.
❑ True ❑ False

16) The FEHA makes it unlawful for an employer to discriminate against an employee based on the employee's actual or perceived sexual orientation, the employee's gender identity, or the employee's gender-related appearance or behavior.
❑ True ❑ False

17) The FEHA's anti-harassment provisions only apply to employers of five or more persons.
❑ True ❑ False

18) Independent contractors, because they do not qualify as employees, do not qualify for protection under the FEHA's anti-harassment provisions.
❑ True ❑ False

19) Under the FEHA, an employer may be held liable for the sexual harassment of its employees or contractors by non-employees, such as customers or other third parties, if the employer knew or should have known of the harassment and failed to take appropriate corrective action.
❑ True ❑ False

20) Under the FEHA, an employer is liable for harassment carried out by supervisors only if the employer knew, or should have known, of the conduct and failed to address it in a timely and appropriate manner.
❑ True ❑ False